In the Queen's Bench.

APPEAL SIDE.

EDWARD CHAPMAN,

Appellant.

vs.

CYRUS S. CLARK, ET AL.,

Respondents.

RESPONDENTS' CASE.

In the Queen's Bench.

PROVINCE OF CANADA, } **Court of Queen's Bench.**
LOWER CANADA TO WIT. }

APPEAL SIDE.

EDWARD CHAPMAN,
Plaintiff in the Court below,
APPELLANT.

vs.

CYRUS S. CLARK, ET AL.,
Defendants in the Court below,
RESPONDENTS.

RESPONDENTS' CASE.

THIS was an action of damages, wherein the Plaintiff in the Court below sought to recover from the Respondents £750 as his damage caused by the Respondents' having, as he alleged, on the 10th and 17th June, 1855, by themselves and persons employed by them for that purpose, broke through and cut the Plaintiff's boom in the River Saint Francis, at Lennoxville, in which he had confined and secured a large quantity of logs, and lumber, and allowed the Plaintiff's logs to be drifted and carried down the river; whereby they became wholly lost to him. Plaintiff also claimed compensation for loss of profits which he would have gained upon lumber in his boom belonging to third parties. which he had contracted to saw, and which was also drifted down the river.

To this claim Defendants set up several grounds of defence, alleging firstly, that the River Saint Francis, across which the plaintiff's boom had been erected, was a river *navigable et flottable*, and consequently a highway upon which the public had a right of passage at all times. That the plaintiff, in obstructing the free passage of the river, was himself a wrong doer, and had no right to claim from Respondents compensation for loss resulting from his own illegal acts. That Plaintiff did not own the lands upon the banks of the river to which his boom was attached.

In addition to this, Respondents urged that the Plaintiff, who had constructed a small Steam Mill at Lennoxville, subsequent to the erection of extensive works at Brompton, by Respondents, and who had a small quantity of logs to be brought down to Lennoxville, for the purpose of availing himself of the labor of Respondents, rolled his logs into the river some ten miles above Lennoxville, just before Respondents' logs, and compelled them, Respondents, to *drive* them down to his boom at Lennoxville. That most of the Plaintiff's logs came down with Respondents' about the first of June, in a *drive* under the charge of Lord, Defendants' foreman. That on this occasion there was no difficulty between Plaintiff and Respondents. That on the 10th June, Plaintiff had only a very small quantity of spruce, hemlock or basswood logs (to which descriptions of timber it will be observed Plaintiff, in his declaration, limits his claim) mixed up with Respondents' logs. That on that occasion, the Respondents had under the charge of Richardson a large quantity of logs; the proportion of Respondents' logs to Plaintiff's of all descriptions, including pine, being 20 to 1. That the boom on the 10th was broken by the force of logs and not by Respondents. That on the 17th, the Plaintiff closed up his boom and although notified by Lord, Respondents' foreman, that he was willing to assist him in assorting the logs, and although informed that unless he opened the boom, he, Lord, must open it himself, refused to allow Respondents' logs to pass, but claimed a right to detain them. That on this occasion, the water was falling, and Respondents' logs in great danger of being stopped, and the Respondents suffering great loss, as well from not getting down their lumber as from the loss of time of a large number of men employed in driving said logs. In addition to this the Respondents pleaded the general issue. Upon this the parties went to proof, and Respondents contend that they have sustained by evidence, every allegation of their pleas.

They have proved the nature and description of river upon which they are charged with having committed the trespasses complained of. That the river has been used for many years as a highway; and they contend, that this fact being once established, the action of Plaintiff falls to the ground at once, and that under the circumstances this is a perfect and complete defence to Plaintiff's demand, inasmuch as Plaintiff does not in his declaration allege any malicious breaking or opening of the boom, or any wanton destruction of or injury to the boom by Respondents or their workmen. The fact of the river being *publici juris*, once established, the Respondents had equal rights in the river with Plaintiff, and the erection of the boom by Plaintiff, and obstruction of the river became a public common nuisance, and the Respondents being particularly injured thereby had a perfect right to abate the nuisance. This Respondents contend, is a principle which cannot be denied. They have also shewn distinctly by all their witnesses that from four-fifths to seven-eights of all Plaintiff's timber which was put into the river, came down mixed with Respondents' first drive under Lord, and which is not complained of. The Respondents further contend that it is distinctly shewn by their witnesses that Mr. Clark the member of their firm who has charge of their operations in Canada, instructed his foreman Richardson, to use no violence to the boom, and to avoid difficulty with the Plaintiff, and those connected with him. (Vide Richardson's evidence.) That no malice or any wrongful or tortious acts on the part of Respondents or which were authorized by them were proved. That on neither occasion was anything more done by Respondents' men than under the circumstances they were entitled to do in order to preserve their employer's property, and that Lord, after due notice and after a refusal on the part of Plaintiff to open the boom, alleging that he had a right to retain the logs, as is distinctly proved by Lord and Dyer, and not contradicted, was justified in opening a passage for the logs of Respondents. Plaintiff failed to prove any right to the land upon the banks of the river where his boom is constructed, and it is shewn by Plaintiff's witnesses, as well as Respondents', that Plaintiff's boom extended wholly across, and closed up passage of the river, at the time when the pretended trespasses are alleged to have been committed. The evidence is too voluminous to refer to at any length, but the Respondents would simply say that all

their witnesses who had an opportunity of seeing the boom and what occurred on the occasions complained of, agree in the main facts upon which Respondents relied, and no attempt has been made to impeach their evidence.

With regard to the amount of damage suffered by Plaintiff, the evidence was so incomplete and unsatisfactory that even if the Court below had been disposed, they had no evidence upon which to have based their judgment in favor of Plaintiff, or to determine the amount of such judgment. The only evidence of amount of damage adduced by Plaintiff was that of Smyth and Carter, and their statement as to quantity of logs carried down the river on the occasions complained of is completely disproved by all of Respondents' witnesses, who show that a very small quantity of Plaintiff's logs, if any, passed down the river on the 16th and 17th June, and that Smyth was altogether in error when he stated that more of Plaintiff's logs came down the river in the 2nd and 3rd drives than before, and his calculations founded upon the amount of lumber which was saved by Plaintiff, give no idea whatsoever of the amount which passed the boom on the occasions complained of, because Respondents have shown that Plaintiff's boom was defective in many respects, was badly situated, and logs were constantly carried under by the force of the current, that it broke on several occasions from the force of the logs, and was totally insufficient for the purposes for which it was built. With regard to the claim set up by Plaintiff for loss of profits which he would have made upon lumber he had contracted to saw, there is no specific allegation in his declaration, either of the amount of the loss so sustained by him, or of the parties with whom he had so contracted, and no legal proof of such contracts or loss, and even if such allegation and proof had been made, the damage claimed for this cause is, Respondents contend, too remote, and cannot, in this form, be sustained. In conclusion, Respondents urge that their defence to the demand of Plaintiff was well sustained, both in law and by evidence, and they are confident that the judgment of the Court below must be confirmed.

SANBORN & BROOKS,
Attorneys for Respondents.